BOOK REVIEWS.

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THE DOCTRINE OF JUDICIAL REVIEW. By EDWARD S. CORWIN. Princeton: THE UNIVERSITY PRESS. 1914. Pp. vi, 177.

This volume contains five essays, of which the most important is one on "Marbury *v.* Madison and the Doctrine of Judicial Review." In this the author sets for himself the task of discovering "the *exact legal basis* of the power of the Supreme Court to pass upon the constitutionality of acts of Congress" (page 1). Professor Corwin seems dissatisfied with the work of his forerunners. He insists that Marbury *v.* Madison presented no valid occasion for any inquiry by the court into its prerogative in relation to acts of Congress, and finds that the "decision bears many of the earmarks of a deliberate partisan *coup*" (page 9). This position is based upon the author's judgment that, by a proper interpretation of the Constitution, the definition in the Constitution of the original jurisdiction of the Supreme Court was not meant to preclude Congress from adding thereto. It is further suggested that by the statute under consideration in the case, Congress did not intend to add to the original jurisdiction of the Supreme Court, but only to grant the use of manadamus as an aid in exercising such jurisdiction. The case might therefore have been dismissed on the ground that the statute did not authorize the Supreme Court to take jurisdiction.

The author further objects to the doctrine that the supposed defects of Marbury *v.* Madison have been cured by popular acquiescence in later decisions. He also finds insufficient for his purpose the fact that a considerable number of the framers of the Constitution personally favored judicial review and the theory that judicial review was the natural outgrowth of ideas that were common property in the period when the Constitution was established. The question is, he says, "not what did the framers . . . *hope* or *desire* with reference to judicial review, but what did they *do* with reference to it;" and he adds that before contemporary ideas "can be regarded as furnishing the *legal* basis of judicial review, it must be shown that they were, by contemporary understanding, incorporated in the Constitution for that purpose and that they were *logically sufficient* for it" (pages 2-3). Professor Corwin is likewise dissatisfied with the theory of Professor McLaughlin that the courts in exercising judicial review claimed no superiority over other departments of the government, but merely insisted upon the right of each department to interpret the Constitution for itself, and that the supremacy of the courts in this task has been due to the acquiescence of the other departments for reasons of expediency.

In his preface the author states:

> Incidentally I have, I trust, laid to rest that most inconclusive explanation of judicial review which dwells on the idea that a legislative measure contrary to the constitution is not law and never was. The alleged explanation totally ignores the crucial question, which is, *Why is it the judicial view of the constitution that legislative measures have to conform to?* (page v).

This question he answers by the proposition

> that the function of interpreting the standing law appertains to the courts alone, so that their interpretations of the constitution as part and parcel of such standing law are, in all cases coming within judicial cognizance, alone authoritative, while those of the other departments are mere expressions of opinion (pages 26-27).

The most important part of Professor Corwin's study consists in his exposition of the acceptance of this proposition by the framers of the Constitution and their contemporaries—a point of view, he says, which marks an entire breach, not only with English legal tradition, but, for the most part, with American legal tradition as well, anterior to 1787. "In the last analysis," says the author, "the doctrine of judicial review involves 'an act of Faith,' to wit, the belief that the judges *really know* the standing law and that they *alone* know it" (page 63).

If this is proposed as the result of the quest for the "exact legal basis of the power," it can hardly satisfy. If, however, it is offered to explain why Chief-Justice Marshall felt that "it is the judicial view of the constitution that legislative measures have to conform to," it explains his idea that a legislative measure contrary to the judicial interpretation of the Constitution is not law and never was.

The author's reasoning is acute and interesting. The reviewer, however, is unable to apprehend the significance of the distinction between his conclusions and those of other writers whom he criticises. The search for the exact legal basis of the judicial power exerted in Marbury *v.* Madison seems still unrewarded. We shall doubtless always have to content ourselves with historical explanations. But this is true of many legal decisions. The declaration of a court is the genesis of many a legal doctrine. However unwarranted such declaration, it becomes law when made and enforced. Long-continued acquiescence in the doctrine, where there is power to annul or modify it, gives it a sanction quite as valid as any derived from initial flawless logic.

The other essays in the volume deal with the question whether the Constitution was a product of the people or the states, the importance, or rather the unimportance, of Peletiah Webster as the originator of the Constitution, the Dred Scott decision, and some possibilities in the way of treaty making. Professor Corwin's method of discussing legal problems is a happy combination of logical analysis and the appeal to history. His final essay on some possibilities in the way of treaty making bids us hope that he will devote his talents more and more to problems of present and future interest and bend his energies more to constructive suggestion and less to destructive criticism.

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LAW OF WILLS, EXECUTORS, AND ADMINISTRATORS. By JAMES SCHOULER, LL.D., 5th Edition. 2 Vols. Albany: MATTHEW, BENDER & Co. 1915. Pp. lxxxiii, xci. 820, 862.

In this work, the latest from the pen of the writer already of high repute before the American Bench and Bar, Mr. Schouler has expanded his former treatments on the same subject to such a degree that his present edition exceeds his last former edition by one thousand and